Supreme Court, U.S.
FILED

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No. 04- ____

In the Supreme Court of the United States

S.L., BY HER MOTHER, CYNTHIA LEE,
Petitioner,

v.

PRINCE WILLIAM COUNTY SCHOOL BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

CYNTHIA LEE
Pro se

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QUESTIONS PRESENTED FOR REVIEW

1. Did the district court judge err when he upheld the hearing officer's decision to deny special education services to S.L. a child with the chronic health impairment sickle cell anemia, which is a qualifying disability as stated in the Individuals with Disabilities Education Act of 1997 (IDEA'97)?

2. Did the Court of Appeals For the Fourth Circuit err in holding that the district court judge made no reversible error in his order denying the Petitioner's Motion To Reconsider Plaintiff's Motion To Set Aside Judgment Pursuant To Fed. R. Civ. P. 60(b)(6) in *S.L. v. Prince William County School Bd.*, No CA-02-1216-A (E.D. Va. Filed October 24, 2003 & entered October 27, 2003)?

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the case caption.

Petitioner
S.L. Lee by her mother, Cynthia Lee (pro se).

Respondent
Prince William County School Board, by their counsel Mary McGowan 4020 University Dr. Suite 300 Fairfax, Va. 22030, telephone number (703) 691-1235.

TABLE OF CONTENTS

Questions Presented for Review I

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Statutory and Constitutional Provisions 1

Statement of Law 3

Argument 11

Reasons for Granting the Petition 16

Conclusion 19

Relief Sought 19

TABLE OF AUTHORITIES

Cases

Board of Educ. v. Rowley, 458 U.S. 176 (1982) 4

Roe vs. Wade, 410 U.S. 113 (1973) 18

Statutes

20 U.S.C. 1400-1412\ Part (B) 1
20 U.S.C. § 1411(a) 3
20 U.S.C. § 1412 (a)(1)(A) 11, 12, 17
20 U.S.C. § 1412 (2)(B) 4
28 U.S.C. § 1254 (1) 1

Other

Individual With Disabilities Education Act,
Public Law No. 105-17, 111 Stat. 37
(1997) 1, 2, 11, 12, 17
IDEA 611 as amended by the IDEA 1997
(Amendments Act) 3
3612 (a)(1)(A) 4
612 (a) (as amended) 4
34 C.F.R. §§ 300.24, 300.7, 300.7 (c)(9) 17
34 C.F.R. § 300.341 4
U.S. Const. Amend. XIV § 1 17
U.S. Const Art. III § 2 . . . . . 1, 3, 16

Rules

Fed. R. Civ. P. 60(b)(3)(6) 1, 2, 4, 15, 16, 18, 19
Supreme Court Rule 10 . . . . . 3, 16

OPINIONS BELOW

The October 24, 2003 opinion of the United States District Court For The Eastern District Of Virginia. The June 17, 2004 unpublished opinion of the United States Court of Appeals For The Fourth Circuit. The July 27, 2004 denial of the petition for rehearing from the United States Court of Appeals For The Fourth Circuit.

STATEMENT OF JURISDICTION

Jurisdiction is proper over this writ pursuant to 28 U.S.C. § 1254 (1) because it is an appeal from a final decision of the United States Court of Appeals and is filed within 90 days of the Court of Appeals denial for rehearing.

STATUTORY AND CONSTITUTIONAL PROVISIONS

This case involves the interpretation and application of The Individuals With Disabilities Education Act, Public Law No. 105-17, 111 Stat. 37 (1997), U.S.C. §§ 1400-1412; Section 504 of the Rehabilitation Act of 1973, Public Law No. 93-112 (1973); The Equal Protection Clause of the 14th Amendment of the U.S. Constitution; Article III section (2) of the United States Constitution; and specifically the Federal Rule of Civil Procedure 60(b)(3)(6). In addition, the United States Court of Appeals 4th Circuit has decided an important question of federal law, that in effect has eroded deep rooted constitutional guarantees that must be addressed by this court.

IDEA, Public Law No. 105-17, 111 Stat. 37 (1997), 20 U.S.C. § 1400, 34 C.F.R. § 300.24 provides:

Special education is a "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability..."

IDEA, Public Law. No. 105-17, 111 Stat. 37 (1997), 20 U.S.C. § 1400, 34 C.F.R. § 300.7 provides:

A child with a disability means "a child evaluated in accordance with IDEA" found to have one or more impairments or disabilities "who, because of that impairment needs special education and related services".

IDEA, Public Law. No. 105-17, 111 Stat. 37 (1997), 20 U.S.C. § 1400, 34 C.F.R § 300.7(c)(9) provides:

Other health impairment is a qualifying disability deserving the receipt of special education services. Definition: Other health impairment means having limited strength, vitality, or alertness, that results in limited alertness with respect to the educational environment. The impairment adversely affects a child's educational performance and is due to chronic or acute health problems. These may include, but are not limited to, conditions such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia.

IDEA, Public Law. No. 105-17, 111 Stat. 37 (1997), 20 U.S.C. § 1412 (a) (1) (A) provides:

A free appropriate public education available to all children with disabilities residing in the State between the ages of 3 and 21.

The Equal Protection Clause of the 14th Amendment provides:

If a State offers public education, then all school age children must have equal opportunity to benefit from that public education.

Fed.R.Civ.P. 60(b)(3)(6) provides:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from final judgment, order, or proceeding for the following reasons: ...(3) fraud (whether heretofore dominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party...(6) any other reason justifying relief from the operation of the judgment.

U.S. Const Art. III § 2

In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction both as to Law and Fact...

Supreme Court Rule 10 provides:

a State court or an United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court...

STATEMENT OF LAW

1. Part B of the Individuals with Disabilities Education Act (IDEA) provides federal grants to States and, through them, to local school districts for assistance in the education of disabled children. Under a statutory formula, each participating State receives federal grant money based on,

among other factors, the number of disabled school-age children in that State. 20 U.S.C. § 1411 (a); see also IDEA 611, as amended by the Individuals with Disabilities Education Act of 1997 (IDEA Amendments Act).

2. A State participating in Part B of IDEA must ensure that each disabled child within the State has available a "free appropriate public education", IDEA (as amended) 3612(a)(1)(A); see also 20 U.S.C. § 1412(2)(B)(1994), that includes all special-education services necessary to meet that child's particular needs. See IDEA (as amended) 612 (a); see also 20 U.S.C. §§ 1412(4), 1414 (a)(5); 34 C.F.R. § 300.341; see generally *Board of Education v. Rowley*, 458 U.S. 176 (1982).

I. Overview of the Case

On October 24, 2003, the United States District Court For The Eastern District of Virginia upheld the hearing officer's decision to deny special education services to S.L. a child with sickle cell anemia, which is a qualifying disability as stated in the Individuals with Disabilities Education Act of 1997 (IDEA'97). The district court judge denied S.L.'s Motion To Reconsider Plaintiff's Motion To Set Aside Judgment Pursuant To Fed. R. Civ. P. 60(b)(6), with the supporting opinion that S.L did not present a "meritorious defense".

The United States Court of Appeals For The Fourth Circuit, on June 17, 2004, held that the district court judge "made no reversible error" in his order denying S.L.'s September 23, 2003 Motion To Reconsider Plaintiff's Motion To Set Aside Judgment Pursuant To Fed. R. Civ. P. 60(b)(6) in *S.L. v. Prince William County School Bd.*, No CA-02-1216-A (E.D. Va. Filed October 24, 2003 & entered October 27, 2003).

II. Background of the Case

As an infant, S.L. was medically diagnosed with sickle cell Hb-S thalassemia, which is form of the chronic health disease sickle cell anemia. S.L. was a transfer student to Woodbridge Senior High School in Prince William County, Virginia, school year 2001-2002. The transfer was for health reasons due to S.L.'s chronic form of sickle cell anemia. S.L.'s attending pediatrician supported the medical transfer and gave the school a "Physician's Authorization For Health Treatment Procedures" dated May 21, 2001.

S.L. became chronically fatigued at the start of school year 2001-2002. Fatigue is a characteristic of sickle cell disease. S.L. alleges that the sickle cell related fatigue caused her to have limited strength, vitality and alertness with respect to her educational environment, which adversely affected her educational performance. S.L. began to fail core classes that were needed to graduate from high school, therefore her mother, who is a master degreed special education teacher, requested special education services for S.L.

January 17, 2002, the school's eligibility committee met and presented pertinent documents that supported S.L.'s eligibility to receive special education services, however the eligibility committee consisting of school personnel and S.L.'s mother, denied S.L. special education services. S.L.'s mother dissented from the decision. Although the eligibility committee did not find S.L. eligible to receive special education services, the committee deemed enough evidence was presented during the eligibility meeting to support rendering S.L. a student in need of a child study plan. Therefore, the school's eligibility committee adjourned and within that instant renamed itself the child study committee

and granted S.L. a child study plan. The child study committee used the same accommodation sheet that was used by the special education department, to develop S.L.'s child study plan. Although deemed unqualified to receive special education services, the school's child study committee gave S.L. special education accommodations through the child study plan, which is not legally binding by federal law.

On February 7, 2002, the child study committee reconvened to review the plan after receiving complaints from S.L.'s mother that several of S.L.'s teachers, specifically her former step team coach/biology teacher, were not following the child study plan. During the meeting S.L.'s mother requested a 504 plan for S.L. due to the fact that eligibility for special education services was recently denied. During the child study committee meeting, S.L.'s mother alleged that S.L. continued to suffer from sickle cell induced fatigue that adversely affected her educational environment by limiting her strength, vitality, that resulted in limited alertness. Teacher educational reports were also presented during this child study committee meeting, which supported the adverse affect S.L.'s sickle cell disease had on her educational environment. S.L.'s P.E. teacher wrote in his February 7, 2002 teacher educational report that S.L.'s weakness in his class was her "physical ability" and that she had a "low attention span". He added that S.L.'s physical problem was "low endurance". S.L.'s orchestra teacher concurred with the P.E. teacher's report when he wrote in his February 5, 2002, teacher educational report that S.L.'s physical problems in his class was "posture problems due to fatigue". Although evidence was revealed that supported the need of special education services or a 504 plan, the child study committee voted to retract the previous accommodations that were given to S.L. and held that S.L. was no longer a child in need of services. S.L.'s mother dissented. In her written dissent, S.L.'s mother alleged that

the retraction of services was due to her complaint that teachers not adhering to the child study plan.

III. Proceedings Below

On February 25, 2002, S.L.'s mother received a Central Office Review of the case. The Prince William County Central Office Review Panel affirmed the school's decision to deny S.L. special education services.

S.L.'s mother obtained an attorney and filed a petition to receive a Due Process Hearing. On May 9, 2002, the due process hearing was held. S.L.'s mother testified concerning her daughter's sickle cell related fatigue and how it adversely affected S.L.'s educational environment thus causing S.L. to fail core academic classes needed to graduate from high school. S.L.'s previous child study plan accommodation sheet was admitted as part of the due process record on behalf of S.L., in an attempt to evidence that the school agreed S.L. was a student in need of services. S.L. also admitted into evidence the May 7, 2002, telephonic testimony from her medical expert witness.

Medical records, letters from S.L.'s treating hematologist, and physician's notes were also entered into evidence, which supported that S.L.'s sickle cell disease was in deed the cause of the fatigue that limited her strength, vitality, which resulted in a limited alertness with respect to her educational environment. The medical records revealed that S.L. suffered from chronic infections, excessively swollen glands (tonsils and adenoids), which obstructed ¾ of her airway, knee pain caused by a benign cyst and fatigue.

On May 7, 2002, a telephonic testimony from S.L.'s medical expert was recorded. He gave in-depth testimony outlining the cause and effects of sickle cell disease. This medical expert's testimony was able to relate S.L.'s chronic and acute infections to her sickle cell disease. He stated as follows, "I think in the scheme of things, children with sickle-cell anemia are at increased risk of infections, and certain infections may become fatal or much more severe, and again, depending upon patient's pre-existing organ damage and disability, even common viral infections can be very serious in these children."

The medical expert testified that there were three primary forms of sickle cell disease. The forms are as follows: Hb-SS, Hb-S Thal., and Hb-SC. He testified that Sickle Cell Hb-SS is considered to be the most severe form of this disease. However, the medical expert clarified this statement by testifying that "within those two variants which are supposed to be mild, there are many patients who can be as severe as the most severe form of the regular kind of sickle-cell anemia. So, just on genetic basis, one cannot make a determination who is going to have more severe disease. It is a totally impossible determination." The medical expert further expounded upon the disease by stating that "anemia is only one small part of a sickle cell disease".

Three classroom teachers, one administrator and the school psychologist testified on behalf of the defendants. For the most part the testimonies given by the defendants were general and opinionated. However, S.L. alleges that two of her teachers' testimonies were profound in nature in that their testimonies were intentionally misleading and fraudulent.

During the due process hearing, S.L. alleges that her P.E. teacher and her biology teacher/former step team coach

rendered fraudulent and misrepresented testimony. S.L.'s P.E. teacher testified during the due process hearing, that throughout the school year S.L. "participated just equally with other students..." in his P.E. class. When questioned about rather or not S.L. took breaks because she was fatigued, the P.E. teacher testified that S.L. did not take "unscheduled" breaks because she was tired. In order to support his testimony concerning S.L.'s endurance level, S.L.'s P.E. teacher testified that S.L. ran 3/4 of a mile in "right over eleven minutes" during their physical fitness testing, which meant that, "she was doing good." S.L.'s P.E. teacher attributed her ability to run well on that day to a "partner" who was "definitely helping her".

S.L.'s mother testified during the due process hearing that S.L. was a member of the step team, however, her sickle cell enhanced illnesses did indeed adversely affect her ability to actively participate. S.L.'s mother testified that S.L's former step team coach and present biology teacher told her that S.L. was placed on team "B" of the step team due to low endurance.

When questioned during the due process hearing, S.L.'s biology teacher/former step team coach testified that S.L. showed no signs of fatigue or low endurance. She also testified that she, "did not have a group that was specified based on endurance." The biology teacher/former step team coach testified that S.L., "was in the less trained group because that was her first year ever stepping with them."

The hearing officer submitted his Decision to affirm the school's denial of special education services, on June 13, 2002. He relied heavily on the alleged fraudulent testimonies of two of S.L.'s classroom teachers. S.L. alleges that in his Decision the hearing officer misrepresented doctor report's,

the testimony of the expert witness, and S.L.'s mother's testimony. She also alleges that the hearing officer excluded pertinent medical records, expert testimony and teacher educational reports from his Decision.

In his June 13, 2002 Decision, the hearing erroneously concluded that S.L.'s form of sickle cell disease was "mild" therefore incapable of adversely affecting S.L.'s educational environment. He wrote as follows: S.L.'s mother "attributes her academic performance to her sickle cell which is mild." "Sickle cell is a serious disease which can be painful and disabling. On the other hand, many sickle cell patients are seemingly not affected. The Student is one of these."

S.L.'s attorney filed a Motion For Summary Judgment on her behalf, In The United States District Court For The Eastern District of Virginia. The district court judge rendered his decision on February 24, 2003. In his Opinion, the district court judge denied S.L.'s Motion For Summary Judgment. He stated that "the decision of the administrative review body was not erroneous". S.L. filed a Motion To Set Aside Judgment Pursuant To Federal Rule Of Civil Procedure 60(b)(6). The district court judge rendered the Motion timely, however denied the Motion on September 8, 2003. S.L.'s mother became her new representative and on September 23, 2003, filed a Motion To Reconsider Plaintiff's Motion To Set Aside Judgment Pursuant To Federal Rule of Civil Procedure 60 (b)(6), pro se. On October 24, 2003, the district court judge denied S.L.'s Motion To Reconsider Plaintiff's Motion To Set Aside Judgment Pursuant To Federal Rule Of Civil Procedure 60(b)(6).

ARGUMENT

1 Did the district court judge err when he upheld the hearing officer's decision to deny special education services to S.L. a child with the chronic health impairment sickle cell disease, which is a qualifiable disability as stated in the Individuals with Disabilities Education Act of 1997 (IDEA'97)?

A proffer of evidence was submitted to the hearing officer which exampled the severity of S.L.'s sickle cell disease and the adverse effect that the sickle cell disease had on her educational environment by causing S.L. limited strength, vitality, and alertness. Although a proffer of evidence was submitted, the hearing officer erroneously represented S.L.'s form of sickle cell disease as "mild" and incapable of causing an adverse effect on her educational environment. He also erred when he relied on misrepresented and fraudulent testimony as the basis of his Decision. The hearing officer's denial of special education service prevented S.L. from receiving a "free and appropriate public education" as provided in Individual With Disabilities Education Act Public Law No. 105-17, 111 Stat. 37 (1997), 20 U.S.C. § 1412 (a)(1)(A).

The district court judge erred in his February 24, 2003 Opinion when he concluded that "the decision of the administrative review body was not erroneous" and relied on the same fraudulent, misrepresented testimony as one basis for his Opinion. In his Opinion the district court judge misinterpreted doctor's notes, the medical expert's telephonic testimony, and pertinent, supporting medical documentation. The district court judge also erred when in his February 24, 2003 Opinion he rendered S.L.'s form of sickle cell disease a "mild course" and incapable of causing an adverse affect on

her educational environment. The district court judge's denial of special education service impeded S.L.'s ability to receive a "free and appropriate public education" as provided in Individual With Disabilities Education Act, Public Law No. 105-17, 111 Stat. 37 (1997), 20 U.S.C. § 1412 (a)(1)(A). Through their denial of special education services both the hearing officer and district court judge committed infractions upon the Equal Protection Clause of the 14th Amendment which provides as follows:

If a State offers public education, then all school age children must have equal opportunity to benefit from that public education.

As aforementioned, in support of their Decisions, the hearing officer and district court judge misinterpreted, misrepresented and excluded pertinent testimony. One such misinterpretation came from a letter dated August 19, 1999, which was submitted into evidence. This letter was written by S.L.'s pediatric hematologist to her primary pediatrician after an annual physical. In this letter the hematologist wrote "As you know, she is a 13-year-old female with S beta plus thalassemia who has had a very "mild course". "She had a single pain crisis in the right arm over the last year." The hematologist's statement was a description of how the sickle cell disease impacted S.L. during that particular year. The statement was not made as an intent to diagnose S.L.'s form of the disease as "mild". However, in their decisions, both the hearing officer and the district court judge misrepresented the hematologist's intentions as a diagnosis of S.L.'s form of sickle cell. The district court judge erred when he concluded that S.L. was repeatedly diagnosed with a "mild course" of sickle cell.

The expert witness testified emphatically that "just on genetic basis, one cannot make a determination who is going to have more severe disease. It is a totally impossible determination." Although this was the expert witness's testimony, the hearing officer and district court judge misrepresented his testimony when they wrote that the expert witness confirmed that "milder cases of sickle-cell anemia produce milder results in patients with sickle-cell anemia"; and that "S.L. had not demonstrated that her mild form of sickle-cell anemia made her any more susceptible to or more likely to suffer severe side effects from common childhood ailments than a child without the disease."

En lieu of this misrepresentation of S.L.'s form of sickle cell disease, S.L. submitted a proffer of additional evidence in her September 23, 2003, Motion To Reconsider Plaintiff's Motion To Set Aside Judgment Pursuant To Federal Rule of Civil Procedure 6(b)(6). This proffer of additional evidence substantiated the fact that S.L. did not have a "mild course" of sickle cell disease. The admitted additional evidence clarified the characteristics of sickle cell anemia and the complexity of S.L.'s chronic form of the disease. S.L. submitted additional evidence in the form of a letter written by her pediatric hematologist's supervisor dated April 30, 2003. His letter reconfirmed the relationship of S.L.'s enlarged glands, which obstructed her airway, to her sickle cell disease. A questionnaire completed by the surgeon who removed S.L.'s swollen tonsils/adenoids, dated April 24, 2003, was also admitted into evidence. His response depicted S.L.'s tonsils and adenoids as "excessively large in size". The surgeon stated that "the excessively swollen glands probably caused poor sleep quality and poor concentration, which could adversely impact school work."

Medical records that outlined the treatment S.L. received after the due process hearing, for numerous sickle cell related pain crises, infections to include pneumonia, and hospitalizations, were submitted as additional evidence in S.L.'s September 23, 2003 Motion To Reconsider Plaintiff's Motion To Set Aside Judgment. Documentation reflecting academic progress was also submitted to depict S.L.'s below average grades that were due to her chronic health condition. The proffer of additional evidence confirmed that S.L. continued to be eligible for special education services "due to" chronic health problems that continued to adversely effect her educational environment and academic performance.

In order to present a meritorious defense in favor of her allegations of fraud and misrepresentation, S.L. obtained and submitted as additional evidence in her September 23, 2003, Motion To Reconsider Plaintiff's Motion To Set Aside Judgment, written testimonies from students who were in her P.E. class and on her step team during the time frame referenced in testimonies during the May 9, 2003 due process hearing.

Additional evidence was submitted in the form of two written testimonies dated April 16, 2003, and May 26, 2003. One written testimony was from the student referred to as S.L.'s "partner" who helped her to run ¾ of a mile in record speed. This student declared in her written testimony that she saw S.L. walking during the mile run and that at times she walked with S.L. because she has asthma and could not run long distances. The additional evidence proved beyond a shadow of doubt that S.L.'s P.E. teacher rendered fraudulent and misrepresented testimony during the May 9, 2002, due process hearing which was the basis of the hearing officer's and district court judge's decisions.

Three written testimonials were submitted as additional evidence from students who were step team members during the school year that was referenced in testimony. One step team member declared in her April 16, 2003, written testimony that this was also her first year ever stepping with the team and she had no more training than S.L. but was placed on team "A" instead of team "B". All three written testimonials revealed that the step team coach told the team that team "B" was for team members who lacked endurance, energy and ability. This additional evidence rendered S.L.'s step team coach/biology teacher's due process hearing testimony fraudulent and confirmed S.L.'s mother's testimony as factual.

Although Fed. R. Civ. P. 60(b)(3)(6) gave the district court judge jurisdiction to grant S.L. relief from the previous judgments, in his October 24, 2003 Opinion, he denied S.L.'s Motion To Reconsider Plaintiff's Motion To Set Aside Judgment Pursuant To Federal Rule of Civil Procedure 60 (b)(6). However, he accepted it's contents, by "treating the motion as one brought under Fed.R.Civ.P. 60(b) as a motion seeking relief from judgment".

In his October 24, 2003 Opinion, the district court judge erred when he found no reason to reconsider his September 8, 2003, Opinion after receiving and admitting the proffer of additional evidence, which confirmed S.L.'s allegations of fraudulent and misrepresented testimony by the adverse party. The district court judge erred when he declared S.L.'s form of sickle cell disease a "mild course". The district court judge erred when he did not relieve S.L. and her legal representatives from final judgment. The district court judge erred when he denied S.L., a student with a qualifiable disability, a "free and appropriate public education" through

special education services. The district court erred by denying S.L. equal protection under the law.

2. Did the U.S. Court of Appeals For The Fourth Circuit err in holding that the district court judge made no reversible error in his order denying the Petitioner's Motion To Reconsider Plaintiff's Motion To Set Aside Judgment Pursuant To Fed. R. Civ. P. 60(b)(6) in *S.L. v. Prince William County School Bd.* , No CA-02-1216-A (E.D. Va. Filed October 24, 2003 & entered October 27, 2003)?

S.L.'s mother appealed the district court judge's October 24, 2003, decision on behalf of her daughter pro se, to the United States Court of Appeals For The Fourth Circuit. On June 17, 2004, the Fourth Circuit erred when the panel of honorable judges affirmed the district court judge's decision, "for the reasons stated by the district court". The panel erred when they did not site material fact or law that would substantiate the district court's denial of the Petitioner's Motion To Reconsider Plaintiff's Motion To Set Aside Judgment Pursuant to Fed. R. Civ. P. 60(b)(6). The Fourth Circuit panel also erred when they did not address the questions that were raised, which were of exceptional importance in the proceedings.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. The Supreme Court should grant the petition for writ of certiorari based on consideration of Rule 10, which declares that this Court should exercise its discretion because, "a State court or an United States court of appeals has decided an important

question of federal law that has not been, but should be settled by this Court...".

This Court should exercise its discretion to grant a petition for writ of certiorari because Article III section(2) of the U.S. Constitution renders Jurisdiction as stated in part; "In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction both as Law and Fact...".

The Court's review is warranted for all of the following reasons.

I. Review Is Warranted Due To Compelling State Interest Because The District Court's Decision Is In Direct Conflict With The Equal Protection Clause Of The 14th Amendment To The U.S. Constitution and Individual With Disabilities Education Act, Public Law No. 105-17, 111 Stat. 37 (1997), 20 U.S.C. § 1400, Part (B), 34 C.F.R.§§ 300.24, 300.7, 300.7 (c)(9) and 1412(a)(1)(A)

At the time S.L. requested special education services, she was a student in need of special education services. S.L. met all of the criteria that are outlined in the IDEA'97's definition of Other Health Impairments, therefore, S.L. was eligible to receive special education services. In denying S.L. special education services, the district court judge denied her a Free Appropriate Public Education as it relates to 20 U.S.C. § 1412(a)(1)(A) and the Equal Protection Clause Of The 14th Amendment. The people of Virginia care about the receipt of special education services for disabled students, therefore review is warranted due to "Compelling State Interest".

II. Review Is Warranted Because Public Education Provides "A Classic Justification For A Conclusion Of Non-moot ness, Due To The Fact That It Is "Capable Of Repetition, Yet Evading Review"

S.L. graduated from high school June 2004, with a standard high school diploma. Although S.L. has now graduated, this proceeding is not moot due to the fact that the district court judge rendered S.L.'s form of sickle cell disease a "mild course". This decision has set a precedent which will deny special education services to students who do not have the Hb-SS form of sickle cell disease. Categorizing sickle cell disease based on the individual's form of the disease erodes the fundamental and long standing constitutionally embedded presumption that students with the disability sickle cell disease who meet the criteria, are eligible to receive special education services as outlined in IDEA'97, no matter their form of the disease. The supreme court judges' opinion declared in *Roe v. Wade*, 410 U.S. 113 (1973), that a classic justification for a conclusion of non-moot ness is a case such as S.L. v. Prince William County School Board, which is "capable of repetition, yet evading review". Therefore review is warranted because this case is "capable of repetition, yet evading review".

III. Review Is Warranted Because The Decision Of The United States Court of Appeals, Fourth Circuit, Has Decided An Important Question of Federal Law That Has Not Been, Yet Should Be, Settled By This Court

CONCLUSION

The petition for a writ of certiorari should be granted because the U.S. Court of Appeals For The Fourth Circuit erred when they affirmed the district court judge's decision "for the reasons stated by the district court". The panel erred when they did not site material fact or law that would substantiate the district court's denial of the Petitioner's Motion To Reconsider Plaintiff's Motion To Set Aside Judgment Pursuant to Fed. R. Civ. P. 60(b)(6). The Fourth Circuit panel also erred when they did not address the questions that were raised, which were of exceptional importance in the proceedings.

The petition for a writ of certiorari should be granted because the district court judge erred when he denied S.L.'s Motion To Reconsider Plaintiff's Motion To Set Aside Judgment Pursuant To Fed.R.Civ.P. 60(b)(6). His decision is in direct violation of IDEA'97 and The Equal Protection Clause of the 14th Amendment, which is a "Compelling State Interest". The petition for a writ of certiorari should also be granted because the district court judge's decision will set a precedence that will discriminate against disabled students with S.L.'s form of sickle cell disease and students who do not have the Hb-SS form of the disease. The petition for writ of certiorari should be granted because this case is "capable of repetition, yet evading review".

RELIEF SOUGHT

S.L. humbly requests this Supreme Court of the United States to relieve her from the finality of the district court judge's decision to deny her Motion To Reconsider Plaintiff's Motion To Set Aside Judgment Pursuant To Fed.R.Civ.P.

60(b)(6). S.L. humbly requests this Supreme Court of the United States to reverse the Fourth Circuit's opinion which affirmed the district court judge's decision. S.L. also request this Honorable Court to award attorney's fees in the form of monetary relief and grant such other relief as the Court may find to be appropriate. S.L. requests oral arguments, which she believes will assist the Court in deciding this case.

Respectfully submitted,

Cynthia Lee
on behalf of her daughter S.L.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

03-2405
[Filed 27, 2004]

S. L. , by her mother, Cynthia Lee
Plaintiff-Appellant,

v.

PRINCE WILLIAM COUNTY SCHOOL BOARD
Defendant-Appellee

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

Entered for a panel comprised of Judge Niemeyer , Judge Widener, and Judge Traxler.

For the Court,

/s/ _____
Patricia S. Connor, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2405

[April 30, 2004, Submitted]
[June 17, 2004, Decided]

S. L., by her mother, Cynthia Lee,)
Plaintiff - Appellant,)
)
v.)
)
PRINCE WILLIAM COUNTY)
SCHOOL BOARD,)
Defendant - Appellee.)
)

COUNSEL:
Cynthia Lee, Appellant Pro se.

Mary Ellen McGowan, SICILIANO, ELLIS, DYER & BOCCAROSSE, Fairfax, Virginia, for Appellee.

JUDGES: Before WIDENER, NIEMEYER, and TRAXLER, Circuit Judges.

OPINION PER CURIAM:

S. L., a minor, by her mother, Cynthia Lee, appeals the district court's order entered on October 27, 2003, denying her motion to reconsider the court's order denying her motion to set aside the judgment pursuant to Fed. R. Civ. P. 60(b)(6).* We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See *S.L. v. Prince William County School Bd.*, No. CA-02-1216-A (E.D. Va. filed Oct. 24, 2003 & entered Oct. 27, 2003). We also deny S. L.'s motion to expedite; we grant S. L.'s motion to amend her docketing statement. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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* Because S. L.'s notice of appeal is not timely as to either the underlying judgment or her first motion to set aside the judgment, we consider the appeal only as it relates to the order entered October 27, 2003.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil No. 02-1216-A

[Filed Oct. 24, 2003

SHAUNTE D. LEE, by her mother, CYNTHIA LEE, Plaintiff,	)
v.	)
PRINCE WILLIAM COUNTY SCHOOL BOARD Defendant.	)

ORDER

For the reasons stating the accompanying memorandum opinion, it is hereby ORDERED that:

1) the Plaintiff's Motion to Reconsider Plaintiff's Motion to Set Aside Judgment Pursuant to Federal Rule of Civil Procedure 60(b) (6) is DENIED;

2) Defendants request for an award of attorneys' fees is DENIED;

3) should Plaintiff wish to appeal, he shall file his notice of appeal within thirty (30) days of the date of entry of this Order; and;

4) the Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

October 24, 2003
Alexandria, Virginia.

/s/_____
United States District
Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil No. 02-1216-A

SHAUNTE D. LEE, by her mother, CYNTHIA LEE, Plaintiff,	)
v.	)
PRINCE WILLIAM COUNTY SCHOOL BOARD Defendant.	)

MEMORANDUM OPINION

This matter is before the Court on Plaintiff's Motion to Reconsider Plaintiff's Motion to set Aside Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) .

I. Background

This case involves the appeal of an administrative decision denying special education services under the Individuals with Disabilities Education Act ("IDEA").[1] In particular, Plaintiff Shaunte Lee ("Lee"), a student in the Prince william County

[1] See generally, 20 U.S.C. §§ 1400 et seq.

School District, requested receipt of special education services under the IDEA claiming that she was qualified for such services because she suffers from sickle cell anemia.

Following a substantive administrative hearing, at which documents, reports and test results were reviewed, witnesses were presented and cross-examined, and at which Lee was represented by counsel, the hearing officer decided that Lee was not entitled to receipt of special education benefits because Lee's sickle cell anemia did not cause her to have limited strength, vitality or alertness and Lee's sickle cell anemia did not adversely affect her school performance.

Lee timely appealed that decision by filing suit in this court on August 16, 2002. After hearing oral arguments, this Court issued a Memorandum Opinion (the "Opinion") and Order granting defendant Prince William County School Board's ("Defendant" or "the School") motion for summary judgment and denying Lee's motion for summary judgment on February 24, 2003.

Although the clerk entered the Order and Opinion on February 24, 2003, Hunter Harrison ("Harrison"), counsel for Lee at the time of the argument on summary judgment, claims that he did not receive a copy of the Order and Opinion until March 30, 2003, 34 days after the date of entry of the Order. After receiving the Order and Opinion, Harrison told Lee that he would not pursue an appeal on her behalf and that he would cease representing her in this matter.

Lee's mother subsequently filed a motion on behalf of Lee on July 22, 2003 seeking to set aside this Court's Opinion and Order. After a hearing, this Court denied Lee's motion on September 8, 2003. On September 23, 2003, Lee filed a motion to reconsider Plaintiff's motion to set aside judgment

pursuant to Fed. R. Civ. Proc. 60(b) (6). This motion also requested that the Court admit additional evidence. The court, in accordance with Local 7(I), declined to hear oral argument on Plaintiff's motion.

II. Plaintiff's Motion to Reconsider

The Plaintiff's motion is a motion to reconsider under Fed. R. Civ. P. 59. This motion must be filed within 10 days after entry of judgment, not within 10 days of the entry of a motion.[2] In the instant case, the summary judgment was entered on February 28, 2003. This motion was not filed until September 23, 2003. Therefore, Plaintiff's motion was not timely filed. Because a motion under Fed. R. Cir. p. 59(e) would be untimely, the Court is giving the Plaintiff the benefit of the doubt and treating the motion as one brought under Fed. R. Civ. P. 60(b)[3]

A. Standard of Review

The Court's consideration of a Rule 60(b) motion proceeds in two stages. First, a movant must meet each of the three threshold considerations: (1) the motion is timely; (2) the moving party has a meritorious defense to the action; and (3) the opposing party would not be unfairly prejudiced by having

---

[2] Fed. R. Civ. P. 59(b) states that "Any motion for a new trial shall be filed no later than 10 days after entry of the judgment. Fed. R. Civ. P. 59(e) states that the "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

[3] A motion to reconsider may be filed under Fed. R. Civ. P. 59(e) as a motion to alter or amend the judgment, or under Fed. R. Civ. P. 60(b) as a motion seeking relief from judgment. See *Small v. Hunt*, 98 F.3d 789, 797 (4th Cir. 1996).

the judgment set aside, See *Nat'l Credit Union v. Gray*, 1 E.3d 262, 2G4 (4th Cir. 1993).

Having met the threshold requirements, a movant must satisfy one of the six grounds enumerated for relief under Rule 60(b). Id. at 266. Under Rule 60(b), "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons": (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could have been discovered in time to move for a new trial under Rule 59(a) ; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. Fed. R. Civ. P. 60(b).

Whether to grant or deny a Rule 60(b) motion is within the sound discretion of the district court. See *Evans v. United Life & Accident Ins*, Co., 871 F.2d 466, 472 (4th Cir. 1989). A Rule 60(b) motion should only be granted upon a showing of "exceptional circumstances., *Dowell v State Farm. & Ca. Auto Ins*. Co., 993 F.2d 46, 48 (4th Cir. 1993). A Rule 60(b) motion is not authorized when it is nothing more than a request for the district court to change its mind. *United States v. Williams*, 674 F.2d 310, 313 (4th Cir. 1982); see also *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) (stating that a motion to reconsider cannot appropriately be granted where the moving party simply seeks to have the Court "rethink what the Court has already thought through--rightly or wrongly").

B. Analysis

Plaintiff is requesting that this Court reconsider its previous denial of Plaintiff's motion under Rule 60(b) (6) . Plaintiff also requests that the Court admit and consider additional evidence. In the September 8th opinion, the Court held that Plaintiff failed to meet the second and third prongs of the threshold showing under Rule 60(b). See Lee v. Prince William County Sch. Bd., No. 02-1216, Mem. Op. at 6-7 (E.D. Va. Sept. 8, 2003). The Court held that Plaintiff could not demonstrate that she had a "meritorious defense." Id. at 6 Furthermore, the Court held that reopening the judgment would unfairly prejudice the Defendant. Id. at 7.

Considering the instant motion, the Court finds no reason to reconsider its ruling of September 8, 2003. Plaintiff, essentially, reiterates arguments previously presented to this Court. Considering the motion under Rule 60(b), the Court still holds that the Plaintiff has demonstrated neither a "meritorious" defense, nor an absence of prejudice to the Defendant.

For these reasons, the Court will deny the Plaintiffs motion for reconsideration under Rule 60(b).

III. Defendant's Motion for Attorneys' Fees

Defendant moves for an award of *attorneys'* fees associated with the expense of defending a matter already decided by this Court. Under Rule 11, the Court may award attorneys fees against litigants who file motions for "any improper purpose, such as to harass or to cause *unnecessary* delay or needless increase in the cost of litigation.- Fed. R. Civ. P. 11 (b) (1). sanctions may also be imposed upon those

who file motions lacking any legal basis. Fed. R. Cir. P. 11(b)(2) .

The Court holds that an award of attorneys fees in this case is not warranted. Pro se litigants receive a greater deal of leeway. When pro se litigants are involved, courts are presented with a "special dilemma." *Beaudett v. City of Hampton* 775 F.2d 1274, 1277 (4th Cir. 1985). In particular, pro se claims often present courts with "obscure Or extravagant claims defying the most concerted efforts to unravel them." *Id.* Nevertheless, the Fourth Circuit has recognized an "indisputable desire that those litigants with meritorious claims should not be tripped up in court on technical niceties." *Id.* at 1277-78 (citing *Gordon v Leeke*, 574 F.2d 1147 (4th Cir. 1978).

The Court does not find that Plaintiff's motion was presented for any improper purpose or that an award of attorneys fees is warranted under Rule 11. Plaintiff is put on notice, however, that this matter has been decided by this court three times (including the award of summary judgment to the Defendants). The Plaintiff may appeal this Court's decision, but it may not file another motion requesting that this court reconsider its past rulings.

IV. Conclusion

For the foregoing reasons, the Court will DENY the Plaintiff's Motion to Reconsider Plaintiff's Motion to Set Aside Judgment Pursuant to Federal Rule of Civil Procedure 60 (b)(6).

October 26, 2003
Alexandria, Virginia

(3)

No. 04-561

Supreme Court, U.S.
FILED
DEC 23 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

S. L.,

Petitioner,

v.

PRINCE WILLIAM COUNTY SCHOOL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

STATEMENT OF CASE 1

SUMMARY OF FACTS SUPPORTING THE LOWER COURTS' RULINGS 4

REASONS FOR DENYING THE PETITION 13

A. The Issues Presented are Moot Because the Student Graduated with a Standard Diploma 13

B. No Important Federal Questions and No Disagreements Among the Circuits or States are Presented for Review 15

C. The Equal Protection Clause is Not Implicated by Petitioner's Claims 16

D. Appeal to the Fourth Circuit was Untimely as to District Court's Affirmance of Hearing Officer's Decision and First Motion to Reconsider, Only Issue Considered by Fourth Circuit and Properly Appealed to this Court was Motion to Reconsider the Denial of the Motion to Set Aside Judgment 17

Contents

Page

E. The Fourth Circuit Court Of Appeals Properly Affirmed The District Court's Decision to Deny Petitioner's Motion to Reconsider Plaintiff's Motion to Set Aside Judgment .. 19

F. The District Court Properly Upheld the Hearing Officer's Finding that Petitioner is Not Eligible as a Student with a Disability Pursuant to the Individuals with Disabilities Education Act 21

G. The Award of Attorney's Fees is Not Proper in this Case 25

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Page

Cases:

Bd. of Educ. Of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982) 14, 22, 24

Browder v. Director, Department of Corrections, 434 U.S. 257 (1978) 18

DeFunis, et al. v. Odegaard, et al., 416 U.S. 312 (1974) 13, 14

Heller v. Doe, 509 U.S. 312 (1993) 16, 17, 18

Honig v. Doe, et al., 484 U.S. 305 (1988) 13, 14

Klapprott v. United States, 335 U.S. 601 (1949) ... 20

Lee v. Prince William County Sch. Bd., Civil Action No. 02-1216-A, Mem. Op. (E.D. Va. October 24, 2003) 12

Lee v. Prince William County Sch. Bd., Civil Action No. 02-1216-A, Mem. Op. (E.D. Va. Feb. 24, 2003) 11, 22, 24

Lee v. Prince William County Sch. Bd., Civil Action No. 02-1216-A, Mem. Op. (E.D. Va. Sept. 8, 2003) 12

Cited Authorities

	Page
Link v. Wabash R.R. Co., 370 U.S. 626 (1962)	20
Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership et al., 507 U.S. 380 (1993)	20
T.S. v. Independent Sch. Dist. No. 54, 265 F.3d 1090 (10th Cir. 2001), *cert. denied*, 535 U.S. 927 (2002)	13
United States of America v. Holland, et al., 214 F.3d 523 (4th Cir. 2000)	19
Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993)	16, 18
United States Constitution:	
Article III	13
Fourteenth Amendment	16
Statutes:	
20 U.S.C. § 1401(3)(A)	23
20 U.S.C. § 1414(B)(4)	1, 5
20 U.S.C. § 1415(i)(3)(b)	25

Cited Authorities

Page

Rules:

Fed. R. App. P. 4(a)(1)(A) 3

Fed. R. Civ. P. 59 3

Fed. R. Civ. P. 60 20

Fed. R. Civ. P. 60(b) ..... *passim*

Fed. R. Civ. P. 60(b)(6) 3, 4, 12, 20

Fed. R. Civ. P. 60(b)(1) 20

U.S. Sup. Ct. R. 15 ..... 4, 18

Regulations:

34 C.F.R. 300.7 .....4, 10, 22

34 C.F.R. 300.7(a) 23

34 C.F.R. 300.7(c)(9) 23

34 C.F.R. 300.122(a)(3) 14

Respondent Prince William County School Board hereby submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioner S.L., by her mother, Cynthia Lee.

STATEMENT OF CASE

On January 17, 2002, an eligibility committee within Prince William County Public Schools ("PWCPS" or "school system") determined that S.L. was not eligible for special education services pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1414(B)(4). (Joint Appendix ("JA"), Ex. K56). This decision was affirmed on February 28, 2002 after a Central Office Review Committee met with the parent and reviewed the determination. (JA, Ex. K67).

Petitioner, by her mother, Cynthia Lee, subsequently requested an administrative due process hearing to appeal the Committee's decision that S.L. was not eligible for special education services. A three day hearing was held in May 2002 before a state hearing officer with testimony presented from seven witnesses. Petitioner and her mother were represented by counsel at this hearing. After the conclusion of the hearing, the Hearing Officer found that S.L. was not eligible for special education services as a child with an other health impairment because the "preponderance of the evidence is that she is not limited by reason of strength, vitality, or alertness, and her sickle cell anemia does not adversely affect her academic performance." (JA, Ex. D, p. 7).

Petitioner and her mother, by counsel, appealed this Hearing Officer's decision to the U.S. District Court for the Eastern District of Virginia on August 16, 2002. After hearing oral argument, the District Court issued a Memorandum Opinion and Order on February 24, 2003 granting the Prince William

County School Board's motion for summary judgment and denying Petitioner's motion for summary judgment. The District Court concluded that the hearing officer's decision that S.L. was not eligible for special education services was supported by the facts presented to him. Specifically, the court held that the hearing officer properly relied on the testimony of seven witnesses and the documentary evidence presented, to conclude that S.L. did not suffer from limited strength, vitality or alertness and that her sickle-cell anemia did not negatively impact her academic performance, entitling her to special education services under the IDEA.

Counsel for Petitioners subsequently claimed that he did not receive the District Court's February 24, 2004 Opinion and Order granting the School Board's Motion for Summary Judgment until March 30, 2003, thirty four days after the Order was entered and the time for appeal had lapsed. Petitioner's counsel also determined at that point that he would no longer represent Petitioner in pursuing this matter.

On July 22, 2003, five months after the District's Order, Petitioner's mother, with a new attorney, filed a motion pursuant to Federal Rule 60(b) with the District Court seeking to set aside that court's Opinion and Order of February 24, 2003. After hearing argument on this motion, the District Court denied the Petitioner's motion on September 8, 2003, because Petitioner failed to meet the threshold requirements under Federal Rule 60(b) to have the previous judgment set aside. Specifically, the District Court found that Petitioner did not present a meritorious defense and the Defendant would be unfairly prejudiced by having the previous judgment set aside.

Petitioner's mother, appearing *pro se*, subsequently filed a motion pursuant to Fed. R. 59 on September 23, 2003, asking the District Court to reconsider Petitioner's 60(b)(6) Motion to Set Aside Judgment. Since this motion was untimely, pursuant to Rule 59, the District Court gave Petitioner the benefit of the doubt and treated her motion as another motion seeking relief from judgment under Fed. R. Civ. P. 60(b). On October 24, 2004 the District Court issued a Memorandum Opinion and Order denying Petitioner's Motion to Reconsider Plaintiff's Motion to Set Aside Judgment Pursuant to Fed. R. 60(b)(6), finding no reason to reconsider its ruling on September 8, 2003 and specifically finding that Petitioner had merely reiterated those arguments which she had previously presented to the court in her earlier motion and still failed to show the requisite elements of a meritorious defense and lack of prejudice to the Defendant.

On October 30, 2003, Petitioner, by her mother, filed a *pro se* appeal of the September 8, 2003 Order to the Fourth Circuit. Since Petitioner failed to properly bring the merits of the case before the Fourth Court by filing a timely appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A) within thirty days after the District Court's February 24, 2003 order, the only issue on appeal to the Fourth Circuit was whether or not the District Court erroneously denied Plaintiff's Motion to Reconsider Plaintiff's Motion to Set Aside Judgment Pursuant to Fed. R. 60(b)(6). After reviewing the record of the lower court and finding no reversible error, the Fourth Circuit by *per curiam* opinion on June 17, 2004, affirmed the District Court's decision to deny Petitioner's Motion to Reconsider Her Previous Motion to Set Aside Judgment. Petitioner then filed a petition for rehearing with the Fourth Circuit, which was denied on July 27, 2004.

It is this June 17, 2004 Order from the Fourth Circuit affirming the District Court's denial of the Motion to Reconsider Plaintiff's Motion to Set Aside Judgment Pursuant to Fed. R. 60(b)(6), that is presented in the Petition for Certiorari to the Supreme Court.

SUMMARY OF FACTS SUPPORTING THE LOWER COURTS' RULINGS

While the administrative record speaks for itself, there are multiple statements in the Petition for Writ of Certiorari that are not supported by the record. Therefore, in accordance with Rule 15 of the Rules of the Supreme Court of the United States, the School Board provides the following summary of facts from the administrative record for the Court's consideration in response to Petitioner's misstatements.

Petitioner, S.L., attended Prince William County Public Schools from kindergarten through her graduation with a standard diploma from Woodbridge High School in 2004 (JA, Ex. K1-2; Petition for Writ). The transfer referenced by Petitioner for the 2001-2002 school year allowed S.L. to remain at Woodbridge High School that year in order to limit stress and anxiety for S.L. (JA, Ex. K 18, 21). S.L. was diagnosed with sickle cell thalassemia at the age of two, but was never found eligible for special education services. (JA, Ex. K 65B; Petitioner's Complaint). Her mother first requested a special education evaluation in 2001 during S.L.'s tenth grade year to determine if she was eligible for special education as a student with an "other health impairment" as defined by 34 C.F.R. 300.7. (JA, Ex. B, p. 49:21-23). On November 1, 2001 a Child Study Committee convened and agreed to complete a full evaluation of S.L., including psychological and educational evaluations. (JA, Ex. K32, 34).

In conformance with the Committee's recommendation for full testing, a psychological evaluation was performed by school psychologist, Dr. Linda C. Ross, an education assessment was performed by education diagnostician, Sherley Channing, and a sociocultural appraisal was performed by school social worker, Michael Kenney. (JA, Ex. 40, 43, and 45.). Dr. Ross's psychological evaluation was conducted over the course of six visits with S.L. As a result of that evaluation, Dr. Ross concluded that S.L. possessed average cognitive skills and found no suggestion that S.L. experienced any processing deficits which had any significant impact upon her academic performance. (JA, Ex K 40.) In addition, as the result of her educational assessment of S.L., Ms. Channing concluded that S.L. was achieving in the average range in all tested areas. (JA, Ex. K43).

Once these evaluations were completed, and teacher educational reports were provided, an eligibility committee, including Dr. Ross, Ms. Channing and the Parent convened to review the available information and evaluation reports, and determined that S.L. was not eligible for special education services pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1414(B)(4). (JA, Ex. K35, K56). Specifically, the team found that S.L.'s medically documented health condition did not require instructional accommodations that could not be provided in a regular education setting. (JA, Ex. K56).

While S.L. did not meet the criteria for eligibility under IDEA, the team agreed to develop a child study plan for S.L. to meet her educational needs without requiring special education. The team determined that S.L. might benefit from such things as preferential seating, study guides, and additional time for tests and assignments. (JA, Ex. K59). However, this does not amount to special education services, and does not support the

Parent's argument that special education services were needed. Instead, the listed accommodations are simply instructional strategies and techniques that can be used to provide additional support and assistance to students in a general education setting.

At the parent's request, the child study team reconvened on February 7, 2002 to review the existing child study plan and to make changes as needed. (JA, Ex. K64). The team did not agree to add the accommodations requested by the parent, but did agree to re-evaluate the effectiveness of the existing plan. (JA, Ex. K, 64) Contrary to the parent's representations in this Court, there is no indication in the record that a 504 plan was requested or discussed at this meeting. The team did discuss the teacher education reports that were prepared since the last child study meeting, and they agreed that it was important for S.L. to take more responsibility for her education. (JA, Ex. K63-64). Contrary to Petitioner's representations, these reports indicate that the teacher's primary concern for S.L. was her failure to use her time wisely, to stay motivated, to pay attention and stay on task. (JA, Ex. K63). In addition, while her PE teacher did note low endurance and a short attention span, he also noted that S.L. had an 85% average in his class at the time of this report. (JA, Ex. K65 p. 3). Similarly, S.L.'s orchestra teacher, while noting some fatigue, also noted that no special instructional strategies were needed in that class because S.L. was able to work the same as her peers, without extra assistance. (JA, Ex. K65 p. 9). None of the other teacher reports indicated any concern with fatigue. Also, contrary to Petitioner's representations, S.L.'s child study plan was not retracted at that time.

At the parent's request, a Central Office Review Committee reviewed the eligibility team's decision that S.L. was not eligible for special education services. (JA, Ex. K67). After this review, it was determined that the eligibility decision made on January 17, 2002 should be upheld because S.L. did not require specialized instruction. It was also determined that the current child study plan was appropriate at that time, but would continue to be reviewed. The Principal subsequently reviewed S.L.'s child study plan again on March 12, 2002, and indicated that the plan continued to allow S.L. to make up work when she was not feeling well, to have untimed tests administered in the office, and to have extended time on assignments. (JA, Ex. K 72).

Petitioner, by her mother, subsequently appealed the eligibility committee's decision by requesting an administrative due process hearing, which was held on May 7, May 9 and May 22, 2002. (JA, Ex. A-C). The only issue before the Hearing Officer (and presented in this appeal) was whether or not S.L. was eligible for special education services under IDEA based on her sickle cell disease. (JA, Ex. B, pp. 9-10)

At the time of the administrative hearing S.L. was a fifteen-year-old, tenth grader attending Woodbridge Senior High School. (JA, Ex. K2.). S.L. primarily earned Bs and "Satisfactories" throughout elementary school and through eighth grade. (JA, Ex. K1-2). In her first year of high school and for the beginning of her tenth grade year she received primarily Bs and Cs. (JA, Ex K2). In the eighth, ninth and tenth grades, S.L. also successfully participated in a strenuous extracurricular activity, the school's step team, which conducted practices after school and performed throughout the school year. (JA, Ex. K27, Ex. B p. 81:4-7).

Petitioner's attorney at the hearing presented only two witnesses, S.L.'s mother and Dr. Sohail Rana, a consulting expert who was not S.L's treating physician and had little or no familiarity with S.L., her medical history, her academic records, or her alleged complaints since he had only met S.L. one time, for approximately forty- five minutes to one hour. In contrast, the School Board presented testimony from five (5) school witnesses including Dr. Ross, the school's assistant principal, and three of S.L.'s teachers who saw her on a daily basis in her educational environment. S.L.'s physical education teacher, her biology teacher and ninth grade step-team coach, and her geometry teacher, as well as the school's assistant principal, all presented testimony that they had never heard S.L. complain of fatigue nor observed her appear to be fatigued at school. (JA, Ex. B, pp 138, 152, 177, and 208). Dr. Ross also testified she didn't see any educational detriment due to S.L.'s sickle cell disease. (JA, Ex. B, p. 118:18-20).

As the only expert witness presented by S.L., Dr. Rana did not present any testimony specifically relating any of S.L.'s infections, allergies, enlarged tonsils, or her problem with snoring to her sickle cell disease. Rather, Dr. Rana gave only non-specific testimony regarding the nature of sickle cell disease and the effects it can possibly have on children in general. Similarly, Dr. Rana's records were not made an exhibit for consideration by the Hearing Officer. (JA, Ex A, p. 19; Ex. E). The only exhibits introduced by the Petitioners were Dr. Rana's curriculum vitae, an encyclopedia article on the disease, and two regulations defining the OHI test. (JA, Ex. F). Contrary to Petitioner's representations, the Hearing Officer did not exclude any offered expert testimony or medical records from the hearing.

Other than Ms. Lee's testimony that S.L. had been absent from school for illnesses, there was never any expert testimony or evidence submitted to explain the nature of any of S.L.'s illnesses or to relate those illnesses to her sickle cell disease. Similarly, while Ms. Lee (who was not an expert witness), testified that in her opinion S.L. experienced fatigue related to her sickle cell disease which adversely affected her educational environment, Petitioner did not offer any evidence or even expert opinion to support her argument. Overall, Petitioner did not present any evidence at the due process hearing to support her repeated *arguments* that S.L. suffered effects from her sickle cell disease which caused diminished strength or vitality, or which adversely affected her education.

While S.L. had received periodic evaluations from Dr. Marian Horn, an oncologist with Pediatric Hematology & Oncology of Northern Virginia, Dr. Horn was not called as an expert witness at the hearing. With respect to S.L's complaints of fatigue, Dr. Horn's records, which were introduced by the School Board at the hearing, indicated that S.L.'s "level of hemoglobin should not be causing her to feel fatigued." Dr. Horn also opined in a letter dated February 20, 2002, which was made part of the administrative record, that she was "not convinced that [S.L.] is in need of special education." (JA, Ex. K 65A, K 65B, K 65C). Contrary to Petitioner's assertions, the medical records that were admitted into evidence during the due process hearing by the school system's attorney, did not support the Parent's claim that S.L.'s sickle cell disease impacted her education.

After hearing all of the testimony presented, and reviewing the documents that were properly received into evidence at the hearing, the Hearing Officer issued a seven-

page opinion that clearly set forth a reasoned basis for his decision, including an analysis of the criteria for finding that a child has an "other health impairment" and a review of the testimony presented by all witnesses. (JA, Ex. D). The Hearing Officer did not give undue weight to the testimony of any one witness, and did not exclude any offered evidence from consideration. He considered and accepted the student's medical records, which were offered by the school system, and the testimony of the parent's medical expert, but recognized that no evidence was presented that the student had actually had any of the more substantial symptoms of the disease. Petitioner did not raise the issue of alleged fraudulent testimony with the hearing officer during the course of the hearing. J.A. Ex. K.

Contrary to Petitioner's representations, the Hearing Officer did not conclude that the student's sickle cell disease was incapable of adversely affecting her educational environment. He concluded that in this particular case, based on the evidence presented at the hearing, S.L.'s sickle cell disease did not cause her limited strength, vitality or alertness and did not actually adversely affect her educational performance. Therefore, the hearing officer found that S.L. was not eligible for special education services pursuant to IDEA as a child with an other health impairment. J.A. Ex. D.

Subsequently, Petitioner, by counsel, appealed the Hearing Officer's decision to the U.S. District Court for the Eastern District of Virginia. The only issue raised by Petitioner before the District Court on appeal was whether or not S.L. was eligible for special education services as a child suffering from an "other health impairment" as defined by 34 C.F.R. 300.7. (Plaintiff's Motion for Summary

Judgment pp 1, 4). On Friday, February 21, 2003, Judge Cacheris heard oral arguments upon the parties' Cross-Motions for Summary Judgment. At the parties' agreement, these motions were based solely upon the record of the administrative hearing, with no "other evidence" being offered or admitted at that time. Judge Cacheris then issued a written final order, along with an eleven page Memorandum Opinion on February 24, 2003, in which the Court granted Defendant's Motion for Summary Judgment, denied Plaintiff's Motion for Summary Judgment, affirmed the Hearing Officer's findings, and dismissed the case with prejudice. *See Lee v. Prince William County Sch. Bd.*, Civil Action No. 02-1216-A, Mem. Op. (E.D. Va. Feb. 24, 2003).

Petitioners did not appeal this final decision of the District Court, which upheld the Hearing Officer's determination that S.L. was not eligible for special education services pursuant to IDEA. Instead, five months after this decision, Petitioner, represented by new counsel, filed a Motion to Set Aside Judgment pursuant to Fed. R. 60(b), based on her allegations of excusable neglect and improper exclusion of evidence by an administrative agency. As the basis for the alleged neglect as well as the showing of extraordinary circumstances required to support such a motion pursuant to Fed. R. 60(b), Petitioner relied on her attorney's claim that he had not received the District Court's Final Order until after the appeal period and the attorney's subsequent decision not to represent her in pursuing an appeal in this case. Petitioner also alleged for the first time in these proceedings that the Hearing Officer and the District Court Judge relied on "perjured testimony," as the alleged basis for the requisite meritorious defense. (Plaintiff's Motion to Set Aside Judgment Pursuant to Fed. R. Civ. P. 60(b), p.3).

After hearing oral argument again on September 5, 2003, Judge Cacheris, on September 8, 2003, rendered a decision denying the motion and upholding the previous judgment. *See Lee v. Prince William County Sch. Bd.*, Civil Action No. 02-1216-A, Mem. Op. (E.D. Va. Sept. 8, 2003). Specifically the Court found that while Petitioner's motion was timely in light of the circumstances, she did not present evidence of the requisite meritorious defense. The Court found that the Hearing Officer did not misunderstand S.L.'s health condition, as alleged, Petitioners did not provided any specifics regarding who or when the alleged "perjured testimony" was presented, and had also failed to present this argument to the District Court in their initial appeal. *Id.* at 4-6. The Court also found that any attempt to re-open the case at that time was prejudicial to the Defendant who was entitled to rely on the finality of judgment. *Id.* at 7.

Petitioner, by her mother, appearing *pro se*, subsequently filed a Motion to Reconsider Plaintiff's Motion to Set Aside Judgment Pursuant to Fed. R. Civ. Pro. 60(b)(6) on September 23, 2003, and also requested admission and consideration of "new" evidence for the first time since the administrative hearing. With regards to the offered evidence, Defendant argued that none of the offered evidence was new, but was simply not previously offered by Petitioners when they had the chance to present additional evidence to the District Court. By Memorandum Opinion and Order dated October 23, 2003, the District Court found no reason to reconsider its prior ruling since Petitioner simply reiterated her previous arguments and still failed to meet the requisite requirements of Rule 60(b). *See, Lee v. Prince William County Sch. Bd.*, Civil Action No. 02-1216-A, Mem. Op. (E.D. Va. October 24, 2003). Contrary to Petitioner's representations, while documents were submitted with her motion to reconsider, the District Court did not admit the additional evidence at that time.

REASONS FOR DENYING THE PETITION

A. The Issues Presented are Moot Because the Student Graduated with a Standard Diploma

In accordance with Article III of the U.S. Constitution, the Supreme Court may only decide cases that present an actual controversy for the Court to resolve at the time of the Court's decision. *See Honig v. Doe, et al.*, 484 U.S. 305, 317 (1988) (citations omitted). This alleged controversy must affect the rights of the litigants before the Court. *See DeFunis, et al. v. Odegaard, et al.*, 416 U.S. 312, 316 (1974). For example, the Court has recognized that a student's graduation from school may moot his/her claims since there remains no actual controversy between the two parties. *See, e.g., id.* at 319-320.

In accordance with this requirement, claims brought under IDEA as a general matter, are moot when a student graduates or reaches an age that exceeds the age of eligibility, since the school system is no longer required to provide a free appropriate public education at that point. *Honig*, 484 U.S. at 318 (finding case moot as to one defendant because he is no longer within age limit for eligibility, and finding case not moot as to other defendant who has not yet completed high school). Unless a student is challenging the appropriateness of his/her graduation or is seeking compensatory services that do not amount to payment for college courses, a valid graduation can moot a claim under IDEA of entitlement to a free appropriate public education. *See, e.g., T.S. v. Independent Sch. Dist. No. 54*, 265 F.3d 1090 (10th Cir. 2001), *cert. denied*, 535 U.S. 927 (2002).

In the present case, S.L. admits in her Petition that she graduated from PWCPS with a standard diploma in June 2004. In accordance with IDEA, even if S.L. had been eligible for special education services, she would no longer be entitled to such services. 34 C.F.R. 300.122(a)(3). Petitioner does not claim to be seeking compensatory services, but instead seeks a form of declaratory judgment or injunctive relief. At the time of the initial appeal to the District Court, Petitioner sought a finding that S.L. was eligible for special education services, and this request is repeated throughout her motions in the lower courts, including her Motion to Reconsider Motion to Set Aside Judgment. Therefore, since S.L. has appropriately graduated with a standard diploma, and is not seeking to challenge her graduation or receive compensatory services, the issue presented in this case is moot.

Petitioner claims that this case should survive dismissal because it is "capable of repetition, yet evading review." However, this exception is not applicable to the present case. While the Court may maintain jurisdiction in cases where there is a reasonable likelihood that petitioners will again suffer the same deprivation that gave raise to their claim, that is not possible in the present case. *See, e.g., Honig*, 484 U.S. at 318; *see also DeFunis*, 416 U.S. at 318-20 (finding questions presented were "certainly not 'capable of repetition' so far as he [petitioner] was concerned"); *Bd. of Educ. Of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 186 n.9 (1982) (court maintained jurisdiction because "the alleged deficiencies in the IEP were capable of repetition *as to the parties before it*, yet evading review," because the IEPs each cover only one school year, and because judicial review inevitably takes longer than that to complete) (emphasis added). Specifically, the issue raised in the present case will not be repeated as to this Petitioner. She will not again be in

high school and will not again be evaluated for special education eligibility. Therefore, this exception does not save her claim.

Finally, IDEA by its very nature requires individualized case-by-case review that is extremely fact specific. The cited testimony of Petitioner's own medical expert illustrates why individual fact-based analysis on a case-by-case basis is necessary in the special education context, and specifically, in cases where the student is diagnosed with sickle cell disease since there are many varieties and degrees of severity with this disease. Contrary to Petitioner's claims, the Hearing Officer's determination that S.L. had a mild course of sickle cell disease based on the evidence presented to him, does not mean that all individuals with her form of the disease will necessarily have a mild course. Similarly, there is no indication in the Hearing Officer's decision or in the lower courts' opinions that any one intended such a result. Those cases will require their own individualized, fact-based review.

B. No Important Federal Questions and No Disagreements Among the Circuits or States are Presented for Review

Both of Petitioner's Motions to Set Aside Judgment, as well as her Petition to this Court, are transparent attempts to reargue the facts presented in her case because she disagrees with the findings of fact made by the Hearing Officer who determined that S.L. was not a child with a disability for purposes of IDEA. As indicated in her Petition for Writ, S.L., by her mother, continues to claim that the Hearing Officer erroneously concluded, based on the evidence presented to him, that S.L.'s form of sickle cell disease was mild and did not adversely impact her education. These issues were findings of fact for the Hearing Officer to decide, not

interpretations or conclusions of law. They certainly do not amount to important federal questions requiring review.

Petitioner does not present any disagreement among the circuits regarding any of the issues presented in this case. Additionally, despite Petitioner's representation that the Fourth Circuit decided an important issue of federal law in the present case that should be reviewed by this Court, Petitioner did not specify the question she believes was decided below. Therefore, Respondent is unable to provide a response regarding the importance of any potential question at this time, but asserts that no important federal questions were decided by the Fourth Circuit in this case.

C. The Equal Protection Clause is Not Implicated by Petitioner's Claims

To the extent Petitioner appears to assert violations of the Equal Protection Clause of the Fourteenth Amendment, her arguments on this matter are unclear and do not provide sufficient information for response. However, it is clear that her alleged Equal Protection challenges were not raised in either the District Court or the Fourth Circuit, and, therefore, should not be considered by this Court. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (following general rule that "where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted); *see also Heller v. Doe*, 509 U.S. 312, 318-19 (1993) (finding argument regarding application of heightened scrutiny not properly before this Court since argument to District Court and Court of Appeals was that rational basis review applied).

Similarly, Petitioner's claims regarding the Equal Protection Clause are improper in the present case since the allegations are made against the hearing officer and district court judge, not the School Board, who is the Defendant in this case. To the extent Petitioner wishes to assert this claim against these other individuals, such claims should be presented in a separate action with proper service on the proper defendants.

Finally, even if Petitioner was able to assert an Equal Protection challenge at this point, a standard rational basis review would apply since she is not asserting protection as a member of a recognized suspect class for purposes of Equal Protection analysis. Such a review requires merely a showing of a rational relationship between the alleged disparate treatment and a legitimate government purpose. *See Heller*, 509 U.S. at 319-321. While there does not appear to be any actual disparate treatment in the present case, any claimed distinction between the services provided to students with disabilities who are eligible for services under IDEA, and those without such disabilities, would certainly satisfy the rational basis standard.

D. Appeal to the Fourth Circuit was Untimely as to District Court's Affirmance of Hearing Officer's Decision and First Motion to Reconsider, Only Issue Considered by Fourth Circuit and Properly Appealed to this Court was Motion to Reconsider the Denial of the Motion to Set Aside Judgment

The Fourth Circuit properly recognized in its June 17, 2004 Order affirming the District Court's decision, that S.L.'s notice of appeal was untimely as to both the underlying judgment affirming the Hearing Officer's decision, and also as to her first motion to set aside that judgment.

(*See* Appendix B of Petition for Writ). The only issue properly before the Fourth Circuit was S.L.'s appeal of the District Court's denial of her Motion to Reconsider the Denial of Previous Motion to Set Aside Judgment. Therefore, this was the only issue considered and decided by the Fourth Circuit.

In accordance with Rule 13 of the Rules of the Supreme Court of the United States, the petition for writ of certiorari in this case is only timely with regards to the Order entered by the Fourth Circuit on June 17, 2004. In addition, as explained in more detail above, since the Fourth Circuit only decided the issue of the denial of the motion to reconsider the previous motion to set aside judgment, this is the only issue properly before this Court for review. *See Zobrest*, *supra*; *Heller*, *supra*. Similarly, this Court has specifically held that an appeal from denial of a motion under Rule 60(b) does not substitute for an appeal of judgment on the merits and does not bring up the underlying judgment for review. *See Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n.7 (1978).

Therefore, in accordance with Rule 15 of the Rules of the Supreme Court of the United States, the Defendant objects to consideration of the first question presented by Petitioner regarding the appropriateness of the District Court's decision upholding the hearing officer in the underlying case on the merits. This issue was not timely appealed to the Court of Appeals or to this Court. It is an apparent attempt to have this court review the issues presented in the underlying case, even though this matter is not properly before this Court.

E. The Fourth Circuit Court Of Appeals Properly Affirmed The District Court's Decision to Deny Petitioner's Motion to Reconsider Plaintiff's Motion to Set Aside Judgment

Petitioner's appeal of the District Court's October 24, 2003 denial of her Motion to Reconsider Plaintiff's Motion to Set Aside Judgment was subject to an abuse of discretion standard of review by the Fourth Circuit. *Id.*; *see also United States of America v. Holland, et al.*, 214 F.3d 523, 527 (4th Cir. 2000). Petitioner did not address in her Petition for Writ, or in her appeal to the Court of Appeals, how the District Court abused its discretion in denying her Motion to Reconsider Plaintiff's Rule 60(b) Motion nor in denying Plaintiff's Rule 60(b) Motion itself. Instead Petitioner continues to merely describe ways in which she does not agree with the decisions of the Hearing Officer and the District Court. Petitioner merely reiterates arguments she presented previously and attempts to present evidence which is not part of the record. In effect, Petitioner has attempted to use both her Rule 60(b) Motion and Motion to Reconsider as vehicles to address the merits of her case, since she failed to appeal the District Court's summary judgment in a timely manner.

In support of her Motion to Reconsider Plaintiff's Rule 60(b) Motion and her Rule 60(b) Motion itself, Petitioner relied primarily on the fact that her attorney allegedly did not receive the District Court's initial Order in time to appeal, and on the subsequent fact that her attorney decided not to represent her in pursuing that matter any further. This action by Petitioner's attorney is not sufficient to support a Rule 60(b) motion. In addition, since finality of judgment is a sacred tenet of law and should not be discarded easily, the

Supreme Court has stated that "keeping [a] suit alive merely because Plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of Plaintiff's lawyer upon the Defendant." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 n.10 (1962).

Petitioner's original Rule 60(b) Motion was allegedly based on both Rule 60(b)(1) for alleged excusable neglect, and on Rule 60(b)(6) for alleged improper exclusion of evidence, which was never explained. However, Petitioner failed to meet her burden to demonstrate any grounds to support her claims pursuant to either section of Rule 60. In accordance with the Supreme Court's previous decisions regarding Rule 60(b) motions, Petitioner's allegations are not encompassed by Rule 60(b)(1) because "excusable neglect" does not incorporate a party's failure to file on time because of reasons beyond her control, which is what Petitioner tried to claim in the present case. *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership et al.*, 507 U.S. 380, 394 (1993). Similarly, Petitioner's claims do not satisfy the requirements of Rule 60(b)(6) because the circumstances in this case do not come close to the "extraordinary circumstances" required to support such a claim. *Klapprott v. United States*, 335 U.S. 601, 613-15 (1949) (finding extraordinary circumstances where individual was stripped of citizenship without evidence or a hearing and without representation of counsel, at a time when the individual was being held in jail with no reasonable opportunity to defend himself).

To the extent Petitioner based her motion upon a claim of improper exclusion of evidence by the administrative agency under Rule 60(b)(6), she failed to identify the evidence that was allegedly excluded, the legal issues to

which the evidence was material, or the basis for her conclusion that the exclusion was improper. Moreover, Petitioner had an opportunity to raise that argument in the District Court as part of her appeal of the decision of the hearing officer. Her failure to do so does not rise to the level of "justifying" relief under Rule 60(b). If a litigant could vacate a Final Order just by claiming that he or she had failed to raise an argument, introduce evidence, impeach a witness, etc., there would be no end to litigation.

Therefore, it was in the sound discretion of the District Court to deny Petitioner's motion to reconsider her motion to set aside judgment. Subsequently, the Fourth Circuit properly upheld this decision for the reasons stated by the District Court. Contrary to Petitioner's unsupported assertions, the Fourth Circuit was not required to issue its own detailed opinion or address each question raised, once it determined that the District Court had not abused its discretion in denying the one motion that was presented on appeal.

F. The District Court Properly Upheld the Hearing Officer's Finding that Petitioner is Not Eligible as a Student with a Disability Pursuant to the Individuals with Disabilities Education Act

The District Court's underlying decision to affirm the hearing officer's finding is not properly before this Court, and Respondent objects to consideration of this question. However, should this matter be considered by the Court, the administrative record shows that the District Court's decision was proper based on the facts presented and applicable federal and state law. Overall, the District Court properly determined that the Hearing Officer's decision "was based on the facts

in the record before him and those facts amply support his conclusion." *See Lee v. Prince William County Sch. Bd.*, Civil Action No. 02-1216-A, Mem. Op. (E.D. Va., February 24, 2003, p.8).

As an initial matter, in accordance with the standard set by this Court in *Rowley*, the District Court properly gave great deference to the Hearing Officer's findings. 458 U.S. at 206 (requiring "due weight" be given to these administrative proceedings). Similarly, the Hearing Officer properly recognized the importance of allowing local educators to exercise their professional judgment when implementing IDEA. These deferential standards are consistent with the Supreme Court's recognition that the provision of IDEA that allows federal courts to review special education decisions, "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities which they review." *Id.*

The issue initially presented in this case was whether or not S.L. was eligible to receive special education services under IDEA. Since S.L. did not meet the definition of a "student with a disability" for purposes of IDEA, she was not eligible and therefore, was not entitled to the services and protections provided by the Act. 34 C.F.R. 300.7.

As recognized by the District Court, "contrary to Lee's assertion, however, a diagnosis of sickle cell anemia does not, *ipso facto*, qualify a student for receipt of special education services." *See Lee v. Prince William County Sch. Bd.*, Civil Action No. 02-1216-A, Mem. Op. (E.D. Va., February 24, 2003, p. 6 n.3). There is no dispute in this case that S.L. was diagnosed with sickle cell anemia. However,

having a medical diagnosis does not necessarily mean that the student meets the definition of a "student with a disability" for purposes of IDEA. In order to be eligible under IDEA as a "student with a disability," a student must both be determined to have one of a list of specific disabilities, including "other health impairment," and must require special education as a result of this disability. 20 U.S.C. § 1401(3)(A); 34 C.F.R. 300.7(a). In order to meet the first prong of this test in the category of "other health impairment," the student must have limited strength, vitality or alertness in the educational environment that is due to a chronic health condition (such as sickle cell anemia) *and* that adversely affects the student's educational performance. 34 C.F.R. 300.7(c)(9). If this prong is satisfied, then the student must also require special education to receive some benefit from his/her education in order to qualify as a student with a disability for purposes of IDEA.

Therefore, in order to qualify as a student with a disability, S.L.'s sickle cell disease must have adversely affected her educational performance and required her to receive special education services as a result of the impact of this disease. Based on these requirements of IDEA, the evidence presented to the Hearing Officer in this case did not support a conclusion that S.L. was a student with a disability. Specifically, S.L., although diagnosed with sickle cell anemia, failed to establish that her condition resulted in limited strength, vitality, or alertness which adversely affected her educational performance within the meaning of the IDEA.

No evidence was presented to show that S.L. actually suffered any severe effects as a result of her sickle cell disease. In fact, after reviewing the administrative record, the District Court recognized that Dr. Rana's testimony was

"entirely general" and did not offer any evidence of, "how the disease affected Lee personally." *See Lee v. Prince William County Sch. Bd.*, Civil Action No. 02-1216-A, Mem. Op. (E.D. Va. February 24, 2003, p.7). Similarly, the administrative record shows that S.L. was receiving passing marks, was able to advance from grade to grade in a regular education setting and ultimately to graduate with a standard diploma, without ever receiving special education services. While not necessarily sufficient to prove FAPE, this Court has recognized these factors as important for determining that a student has received educational benefit. *Rowley*, 458 U.S. at 207 n.28.

Finally, while Petitioner does not agree with the Hearing Officer's or the District Court's factual findings, the Hearing Officer is entitled to weigh the evidence presented to him, according to his discretion. As the District Court properly recognized, the Hearing Officer was able to interact with and observe, the live testimony of the school system's witnesses at the due process hearing and was able to weigh their testimony, in addition to the documentary evidence, in order to reach the reasoned conclusion that S.L.'s sick cell anemia did not cause adverse educational impact. The fact that the Hearing Officer did not strongly weigh either Lee's testimony or that of Dr. Rana, does not mean that the Hearing Officer's conclusions were erroneous, or that the respective testimony of these witnesses was "excluded", as Petitioners allege.

G. The Award of Attorney's Fees is Not Proper in this Case

Since Petitioner is not the "prevailing party" in this matter, she is not entitled to attorney's fees in accordance with IDEA. 20 U.S.C. § 1415(i)(3)(b). In addition, even if attorney's fees were permissible, Petitioner is not entitled to recover any fees for the period when she was represented by her mother, appearing *pro se*.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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(2)

No. 04-561

In the Supreme Court of the United States

S.L., BY HER MOTHER, CYNTHIA LEE,
Petitioner,

v.

PRINCE WILLIAM COUNTY SCHOOL BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Introduction 1

Reasons for Granting the Writ 7

A. THE PETITION FOR WRIT OF CERTIORARI SHOULD SURVIVE DISMISSAL DUE TO COMPELLING STATE INTEREST 7

B. THE PETITION FOR WRIT OF CERTIORARI SHOULD SURVIVE DISMISSAL BECAUSE PUBLIC EDUCATION PROVIDES "A CONCLUSION OF NON-MOOTNESS, BECAUSE IT IS "CAPABLE OF REPETITION, YET EVADING REVIEW" 8

C. THE PETITION FOR WRIT OF CERTIORARI SHOULD SURVIVE DISMISSAL BECAUSE PUBLIC EDUCATION AND THE PROVISION OF SPECIAL EDUCATION SERVICES IS AN IMPORTANT QUESTION OF FEDERAL LAW 9

D. THE AWARD OF ATTORNEY'S FEES ARE WARRANTED 10

Conclusion 10

TABLE OF AUTHORITIES

Constitution, Statutes, and Rules

U.S. Const. Amend. IV 7, 8

20 U.S.C. § 1415(i)(3)(b) 10

Va. Code Ann. § 22.1-215 8

Fed. R. Civ. P. 60(b)(6) 7, 9

REPLY BRIEF OF PETITIONER

Petitioner, S. L. respectfully submits that in their Brief In Opposition, Respondents have intentionally stated misleading information as though it were factual. Therefore, Petitioner S.L. humbly submits that the misconceptions must be responded to in order to address the new points raised in the Respondent's Brief In Opposition.

INTRODUCTION

Though the parties to this suit are entitled to their respective allegations against and denials of each alleged factual assertions made by the Petitioner; the resolution of factual claims is not necessary to the disposition of legal and constitutional issues that are stated here in. The relevance to the Petitioner's claim is that the issues presented in her Petition For Writ of Certiorari are of exceptional importance and capable of reoccurring, yet evading review.

I.

Respondents assert that the child study plan, which was given to S.L. en lieu of special education services, "does not amount to special education services." (page 5 p. 3 of the Brief In Opposition). Contrary to Respondents' contention, the child study committee used the "Student Information Classroom Modifications" special education form to give S.L. specialized and individualized instruction in the general education environment. (JA, Ex. K59). The use of this form verifies that the child study committee did indeed provide her with special education services through her child study plan.

II.

The Respondents stated that the teacher education reports submitted for review during the February 7, 2002 child study meeting "indicate that the teachers' primary concern for S.L. was her failure to use her time wisely, to stay motivated, and to pay attention and stay on task." (Respondents' Brief Of Opposition page 6, p. 2.). Contrary to Respondent's allegation, in addition to Mr. Muster's February 5, 2002 report, which states that S.L. has "low endurance" and her weakness is "physical ability"; and Mr. Hearne's February 7, 2002 teacher report, which states that S.L.'s physical problems in his class is her "posture due to fatigue", the following teacher reports, (JA, Ex. K63), were submitted:

1. Mr. Lockhart –10th grade World Geography February 4, 2002 Teacher Educational Report states that S.L.'s strengths are as follows: S.L. is very pleasant, she has a positive attitude about Geography, and does assignment consistently.
   Weaknesses – Test performance, takes her time, suspect that she reads slowly.
   Work Habits – Could pay better attention in class, and take better notes
   Peer and Adult Relationships – Very friendly to peers and me
   Instructional Strategies – S.L. receives individual help in just about everything that is done in the class to include tests, assignments, projects, notes, etc.

2. Mr. Hoefler – English February 5, 2002 Teacher Educational Report states that S.L.'s strengths are as follows: Verbal expression

Weakness – Organization; staying on task; written expression
Work Habits – Recently has been drifting off task and forgetting
Peer and Adult Relationships – "No problems"
Instructional Strategies – Sit near front of room to monitor; take writing needs into consideration

3. Ms. Evans 10th grade Biology February 6, 2002 Teacher Educational Report states that S.L.'s strengths are as follows: Cooperative activities with group participation
Weakness – Organization, completion of assignments
Work Habits – Take time on complex tasks, able to work quietly and diligently. Can quickly finish simple tasks
Peer and Adult Relationships – Good, very respectful and cooperative
Instructional Strategies – Extra time, wait time for answers, use of visual transparencies for better note taking

4. Mr. Hollenbeck 10th grade Geometry February 6, 2002 Teacher Educational Report states that S.L.'s strengths are as follows: S.L. is cooperative and courteous. She comes in after school on Tuesdays and Thursdays for extra help on assignments. S. L. is well behaved in class.
Weakness – S.L. has very weak math skills. Her lack of Algebra skills has been a hindrance for her in Geometry.
Work Habits – S.L. comes in regularly after school to get extra help.
Peer and Adult Relationships – S.L. gets along

> well with peers and adults. She has no discipline referrals
> Instructional Strategies – At the beginning of each chapter S.L. is given a chapter assignment sheet with the topics, vocabulary words and assignments. (etc.).

The reports reveal that S.L. did indeed strive to succeed in all of her classes, however fatigue played a major role in her ability to put forth her best effort. Furthermore, the "instructional strategies" reveal that S.L. did indeed receive specialized, individualized instruction, accommodations and modifications in all of her classes through the child study plan. Although S.L.'s mother objected, during the March 21, 2002 child study review plan meeting, the child study plan was amended and placed on the "Child Study Minutes" form as oppose to the detailed "Student Information Classroom Modifications" form that the plan was originally placed. (JA, Ex. K76). As amended, S.L. lost many of her modifications and accommodations.

III.

The Respondents allege that the, "Hearing Officer did not give undue weight to the testimony of any one witness, and did not exclude any offered evidence from consideration." (Respondent's Brief In Opposition page 10 p. 1). The Petitioner disagrees with the Respondents' claim. In reality, the hearing officer received medical reports that detailed S.L.'s fatigue, swollen glands, and chronic reoccurring infections. (JA, Ex. K99). Therefore, the Petitioner alleges that the hearing officer did give undue weight to the testimonies of the school officials and excluded pertinent, factual evidence offered from the submitted medical records, Petitioner's expert witness and her mother.

For example, during the due process hearing, S.L.'s mother testified that she did indeed take S.L. to the ear, nose, and throat (E.N.T.), doctor. Medical documentation was also admitted into evidence for the hearing officer's viewing, which supported Ms. Lee's testimony. Although testimony was rendered and evidence was submitted, the hearing officer completely disregarded the testimony as well as medical records and wrote erroneously in his June 13, 2002 Decision page 7, as follows: "Although the Mother asked for and received a referral to an ear, nose, and throat specialist, Shaunte never went to see that doctor", as part of his justification for denying S.L. special education services.

IV.

Respondents state in their Brief In Opposition that the "Petitioner did not raise the issue of alleged fraudulent testimony with the Hearing Officer during the course of the hearing." (Brief In Opposition page 10 p. 1). The Petitioner disagrees with the Respondents' misleading statement. In reality, the Petitioner referenced the alleged fraudulent testimony throughout all of the proceedings. During the due process hearing, the Petitioner's lawyer brought to the attention of the hearing officer the discrepancy between Mr. Muster's (S.L.'s P.E. teacher) testimony during the May 9, 2002 due process hearing when he described S.L. as an energetic student who "participated equally with the other students", and his February 5, 2002 Teacher Education Report when he described S.L.'s physical problem as "low endurance" and weakness being her "physical ability." (pages 230 - 231 of the verbatim transcript of the May 9, 2002 Due Process Hearing). S.L.'s lawyer also questioned Ms. Evans (step team coach/Biology teacher), during the due process hearing by using references from S.L.'s mother's testimony during the due process hearing, which alleged that

Ms. Evans had placed S.L. on team "B" due to "low endurance." It is documented that Ms. Evans testified that S.L. was not placed on team "B" due to low endurance but she was placed on team "B" because it was her first year stepping in high school. (pages 165-166 of the verbatim transcript of the May 9, 2002 Due Process Hearing). The Petitioner alleges that the hearing officer did not give adequate weight to her attorney's comparisons in his June 13, 2002 Decision. Instead of acknowledging the discrepancies between Mr. Muster's February 5, 2003 Teacher Education Report and his May 9, 2003 due process testimony as presented by S.L.'s attorney, the hearing officer referenced Mr. Muster's verbal testimony as factual, in his June 13, 2002 Decision. (Due Process Hearing Officer's Decision page 6 p. 2-3). The hearing officer also referred to Ms. Evans's alleged fraudulent testimony to justify his Decision to deny S.L. special education services. (IBID page 4 p. 2 and page 6 p. 4).

V.

Respondents referenced the district court judge's September 8, 2003 Decision which states that the Petitioner did not present the argument of "perjured testimony" in her initial appeal. (Respondents' Brief In Opposition page 12). However the district court judge's conclusion in his September 8, 2003 Decision was erroneous. Petitioner did indeed reference the argument of "perjured testimony" in her initial appeal. The reference was argued in front of the judge on February 21, 2003 and the district court judge responded to the allegation of fraudulent testimony in his February 24, 2003 Decision. The district court judge's response in his initial Decision dated February 24, 2003, supports Petitioner's assertion that she did indeed reference "perjured testimony" in the initial district court proceeding.

VI.

The Respondents also contend that the district court judge did not admit S.L.'s additional evidence, which was submitted in her September 23, 2003 Motion to Set Aside Judgment Pursuant to Fed. R. Civ. P. 60(b)(6). (Respondents' Brief In Opposition page 12). The Petitioner disagrees with Respondents' contention. In his October 24, 2003, Decision the district court judge acknowledged the request to admit additional evidence. This acknowledgment is perceived by the Petitioner as an admittance of evidence because the district court judge had in his discretion the ability to formally decline the Petitioner's request to admit the additional evidence, however he chose not to reject its admittance but to acknowledge the request for admittance.

REASONS FOR GRANTING THE WRIT

A. THE PETITION FOR WRIT OF CERTIORARI SHOULD SURVIVE DISMISSAL DUE TO COMPELLING STATE INTEREST

Respondents allege that the Equal Protection Clause is not implicated by Petitioner's claims because her claim is raised against the hearing officer and the district court judge and not against the School Board. However, Petitioner stands in disagreement. Indeed Petitioner alleges that the School Board erroneously declared that her sickle cell disease did not adversely impact her educational environment, which inhibited her from receiving a free appropriate public education as stated in IDEA '97. The School Board's denial of special education services to S.L. is in direct conflict of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution and IDEA '97.

Petitioner in so many words, has always asserted that she is protected as a member of a recognized suspect class for the purpose of Equal Protection. In denying S.L. special education services based on the pretense that she has a "mild" form of sickle cell disease, the hearing officer and district court judge demonstrated eraga omnes. Meaning, the Decision will set a precedence that could hinder the recognized class of students with sickle cell disease, from receiving their lawfully guaranteed, free appropriate public education. see (Dr. Rana's Telephonic Testimony May 7, 2002 pages 8-10). Inter alia, the people of Virginia care about the receipt of special education services for disabled students. Evidence of this fact is documented in the Code of Virginia 22.1-215. Thus, the Petitioner's Writ Of Certiorari should be granted due to Compelling State Interest.

B. THE PETITION FOR WRIT OF CERTIORARI SHOULD SURVIVE DISMISSAL BECAUSE PUBLIC EDUCATION PROVIDES "A CONCLUSION OF NON-MOOTNESS, BECAUSE IT IS "CAPABLE OF REPETITION, YET EVADING REVIEW"

The Respondents allege that the issues at hand are not "capable of repetition, yet evading review". However, Petitioner alleges that in their Decisions the hearing officer and district court judge erroneously categorized S.L.'s form of sickle cell disease as "mild", thus setting precedence for future generations of sickle cell disease students to be mandated to adhere to their findings. Therefore, jurisdiction of this honorable Court is not ultra vires. In reality, this honorable Court may maintain its jurisdiction over the present case ipso facto that sickle cell disease is inherited and as in Roe v. Wade, there is a reasonable likelihood that S.L. will bear a child that has sickle cell disease therefore S.L. could again suffer the same deprivation that gave rise to her claim.

In addition, as in Roe v. Wade, this honorable Court may maintain its jurisdiction ipso facto that intergenerational rights of future students who stand in need of special education services may suffer the denial of special education services based on their form of the disease. Therefore, this case is a classic justification for a conclusion of non-mootness, due to the fact that it is "capable of repetition, yet evading review."

C. THE PETITION FOR WRIT OF CERTIORARI SHOULD SURVIVE DISMISSAL BECAUSE PUBLIC EDUCATION AND THE PROVISION OF SPECIAL EDUCATION SERVICES IS AN IMPORTANT QUESTION OF FEDERAL LAW

Inter alia, the issues that were properly before the Court Of Appeals encompassed the hearing officer's Decision as well as the district court judge's affirmation of the hearing officer's Decision. Indeed, the case presented to the Fourth Circuit Court of Appeal included all of the issues set forth by the Petitioner as well as the additional evidence that was rendered in Petitioner's Motion To Set Aside Judgment. (see Petitioner's September 23, 2003 Motion To Set Aside Judgment Pursuant to Fed. R. Civ. P. 60(b)(6)).

Contrary to the basis of Respondents' objection, the Petitioner has profoundly placed before both the district court judge as well as the Fourth Circuit Court of Appeal the first question presented in her Petition For Writ Of Certiorari. The U.S. Fourth Circuit Court Of Appeal's panel of justices erred when they did not address the questions that were raised, which were of exceptional importance to the proceedings. The U.S. Fourth Circuit Court of Appeals also erred when the panel did not site material fact or law that would substantiate the district court's denial of the Petitioner's Motion To Reconsider Plaintiff's Motion To Set Aside Judgment. (U.S.

Fourth Circuit Court Of Appeal's Decision dated June 17, 2004). Ipso facto the first question is indeed properly placed before this honorable Court. Therefore, the Petitioner humbly requests that this honorable Court overrule the Respondent's objection and recognize the first question, which is stated in her Petition For Writ Of Certiorari. The Petitioner also prays that the honorable Court will grant her Petition For Writ Of Certiorari because the provision of special education services is an important question of federal law which has been decided by The United States Court Of Appeals, Fourth Circuit that has not been, yet should be, settled by this Court.

D. THE AWARD OF ATTORNEY'S FEES ARE WARRANTED

The Respondent has concluded that the award of attorney's fees is not proper because the Petitioner is not the "prevailing party". However, if this honorable Court finds in favor of the Petitioner, than she will be the "prevailing party" and will then be entitled to receive attorney's fees in accordance with IDEA 20 U.S.C. 1415 (i)(3)(b). Therefore the request for attorney's fees is proper. The Petitioner is well aware of the fact that she can not collect attorney's fees for the period of time in which she was appearing pro se.

CONCLUSION

For all of the foregoing reasons the Petitioner humbly requests this honorable Court to grant her Petition For Writ Of Certiorari.

Respectfully submitted,

Cynthia Lee
on behalf of her daughter S.L. pro se